**Frontier Workers and Access to Welfare Benefits in the Member State of Employment: Too Much of a Strain?**

# Frontier workers, their family members and access to welfare benefits in the Member State of employment: Too much of a strain?

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## 1. Introduction. The increasing scale of cross-border commuting in Europe and its relevance for EU law

Worker cross-border commuting has grown steadily in the European Union over the past twenty years. A survey conducted in 2006 and published in 2009 revealed some 780 000 frontier workers (Nerb, Hitzelsberger, Woidich, Pommer, Hemmer e Heczko 2009). Given EU enlargements since that time, the number of frontier workers has conceivably risen. In 2014, the European Commission issued a memorandum on EU labour mobility, estimating approximately 1.1 million cross-border workers. Labour market flexibility, the impact of the economic crisis on worker mobility and the ever-closer integration of national markets are contributing to further boosting the phenomenon (European Commission 2014).

Under EU law, 'frontier worker' means any individual pursuing an activity as an employed or self-employed person in a Member State but residing in another Member State to which he/she returns daily or at least once a week as a rule[1]. Cross-border workers represent a specific category of migrant workers: the latter reside in the State of employment, whereas the former work in a country other than their Member State of residence.

In any event, in principle frontier workers must be accorded the safeguards and rights encompassed in Article 45 TFEU and in relevant EU secondary legislation concerning worker freedom of movement. In this context, two issues often arise with regard to the implications of cross-border commuting for the State of employment, namely the treatment of wages for tax purposes and eligibility for social benefits. While the former aspect lacks common EU rules and is usually left to bilateral agreements on double taxation [2], EU legislators and the CJEU have addressed the latter problem on several occasions, in relation to both frontier workers and their family members.

In particular, cross-border workers' individual prerogatives and expectations of a "completely equal footing"[3] protected by EU law have often clashed with

[1] The definition is provided by Art. 1 let. f) of Regulation 883/2004 of 29 April 2004 of the European Parliament and the Council on the coordination of social security systems.
[2] This aspect will not be considered in the present analysis.
[3] CJEU, judgment of 2 February 1989, case 186/87, *Cowan*, par. 10.

national interests. In times of economic crisis and revived nationalism, individuals' mobility is under pressure from growing mistrust, and foreign workers are increasingly perceived as invading national job markets. Moreover, it has been remarked that governance of the foreign workforce in many Member States is leading to skills and origin-based preferences, rather than enhancing workers' mobility rights in the EU (Paul 2013). *A fortiori*, the rising scale of cross-border commuting is a convenient scapegoat for veiled protectionist reactions to the lack of job opportunities and to tight national budgetary constraints. As a result, frontier workers and their family members end up being the primary targets of indirect discriminatory measures that hinder the exercise of their rights of free movement[4].

In this context, the present contribution examines how the Court of Justice deals with the specific situation of cross-border commuters. To this end, the analysis considers whether their economic link with the State of employment allows them to obtain financial aid from that State, regardless of their choice of residence. From the opposite standpoint, the key question is whether the Member States of employment are entitled to refuse to grant social advantages to workers and their family members who reside elsewhere. In fact, recent practice shows a trend towards a watered-down approach to the principle of non-discrimination on grounds of nationality. This tendency takes the shape of integration requirements imposed on frontier workers as a condition for welfare support, measures that are usually reserved to inactive citizens with no economic connections to the host Member State. In practice, the intent is often to restrict eligibility for social advantages, so as to separate the cross-border commuter regime from the situation of 'ordinary' migrant workers.

Firstly, the article briefly addresses case law on economically inactive citizens' access to welfare benefits in the host Member State. Specific attention is devoted to integration conditionality measures imposed by host Member States. Secondly, the analysis considers whether Member States are entitled to follow a similar approach in relation to frontier workers, due to their dual link with the State of origin and the State of employment. Member States are increasingly resorting to the permissive role played by integration requirements, which act as a shield protecting national welfare systems from (allegedly) excessive burdens. It is therefore worth discussing the drivers and justifications underpinning this trend and the extent to which this narrow approach to the principle of non-discrimination is accepted by the Court of Justice, if indeed it is.

## 2. Economically inactive EU citizens and integration conditionality: an ever closer… access to welfare

### *2.1. Economically inactive EU citizens and the genuine link test*

[4] In principle, with very few exceptions, EU law makes no distinction between workers and their family members' rights: CJEU, judgment of 30 April 1996, case C-308/93, *Bestuur van de Sociale Verzekeringsbank*; judgment of 5 February 2002, case C-255/99, *Humer*, pars. 51-53.

Social policy and the social integration of foreign nationals are competences reserved to the Member States. National authorities enjoy a significant margin of discretion[5], while EU legislation only encourages coordination among national welfare systems as a means to neutralize potential obstacles to freedom of movement (Pennings 2012). In any event, when confronted with the rights ensuing from the pillars of the internal market, national measures must not conflict with the fundamental principles of European legal order[6].

Caught between the integrative function of the principle of non-discrimination on the grounds of nationality and the interests of the Member States, this elusive notion is used to restrict the scope of application of the individual rights stemming from the establishment of the internal market. Whilst integration requirements have several implications in other fields of EU and national law (Mancano 2016, Montaldo 2016), Member States often impose them as a mandatory condition for economically inactive EU citizens to benefit from national welfare systems. In these situations, in fact, the absence of an economic link between the individual and the host Member State - and the subsequent lack of contribution to the national welfare system - can be overcome only if a sufficiently close personal connection has been established and can be demonstrated (Amadeo 2011).

From this point of view, on the one hand, the Court of Justice has acknowledged that Member States are required to show a certain degree of financial solidarity to foreign EU citizens and their family members[7]. On the other, "it is permissible" for national authorities to ensure that welfare support granted to foreigners "does not become an unreasonable burden" hampering overall levels of assistance[8]. Seeking to reconcile concerns regarding unbridled access to social benefits by those who do not contribute to economic welfare, the Court of Justice has developed a specific form of integration conditionality. In this approach, Member States can render the exportability and granting of welfare benefits conditional upon a tangible link with the State concerned. In practice, welfare benefits can be legitimately reserved to inactive EU citizens who are able to demonstrate they achieved a certain level of integration in the host society[9].

As a means of addressing fears of unbearable welfare tourism, the genuine link criterion influences eligibility for a social benefit and warrants exclusion for many potential recipients. Therefore, national measures making the granting of social advantages contingent upon the demonstration of a genuine and stable link with the Member State where financial aid is sought can cause indirect discriminations that negatively affects foreign citizens. The key questions then become: what is the content of the notion of integration, and what degree of connection with the host society has to be established?

As long as the welfare benefit at issue is not governed by EU law, settled case law clarifies that Member States enjoy wide discretion in deciding which

[5] CJEU, judgment of 18 July 2007, case C-213/05, *Geven*, par. 27.
[6] CJEU, judgment of 26 January 1999, case C-18/95, *Terhoeven*, par. 44.
[7] CJEU, judgment of 20 September 2001, case C-184/99, *Grzelczyk*, par. 44.
[8] CJEU, judgment of 15 March 2005, case C-209/03, *Bidar*, par. 56.
[9] *Bidar*, par. 57.

criteria to use for such an assessment[10]. Nonetheless, discretion in matters of social policy may not undermine the rights granted to individuals by the primary provisions regarding their fundamental freedoms[11]. It has also been suggested that, in principle, even in the absence of an economic link with the host State, a sufficient level of integration is to be inherently presumed in the event of a legal residence (Azoulai 2010)[12]. Moreover, the Court of Justice has consistently held that the criteria identified to demonstrate a genuine link "must not be too exclusive in nature". They must not unduly select elements that "are not representative of the real and effective degree of connection", to the exclusion of all other relevant factors[13].

As a rule, duration and continuity of residence are considered prototypical and all-encompassing conditions for demonstrating one's degree of integration, since they likely entail the establishment of stable personal links with the host society[14]. Close personal and family ties likewise contribute to the appearance of a lasting connection[15], as well as the demonstration of genuine attempts to seek employment for a reasonable time[16]. On the contrary, obligations to have completed a certain number of years of study[17] or to have obtained a diploma or professional qualification within the territory of a given State[18] have been labelled as overly exclusive in nature.

Therefore, the criteria on which the genuine link is based must be flexible enough to address the challenge of diversity and complexity, inherent to the fuzzy notion of personal integration (Papadopoulos 2011). What is more, integration conditionality can have indirect discriminatory effects, to the detriment of the citizens of other Member States and their family members. As potential opportunities for major deviations from EU citizens' regime and internal market freedoms, the relevant national measures must pursue a legitimate objective in the public interest, and be scrutinized in light of their appropriateness and proportionality to it. Discriminatory measures can be justified only insofar as they adequately and necessarily meet such an objective, given the absence or non-feasibility of alternative and less restrictive solutions (Nascimbene and Rossi Dal Pozzo 2012).

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[10] CJEU, judgment of 26 October 2006, case C-192/05, *Tas-Hagen and Tas*, par. 36; 1 October 2009, case C-103/08, *Gottwald*, par. 34.

[11] CJEU, judgment of 11 January 2007, case C-208/05, *ITC*, par. 40. In relation to frontier workers, see Court of Justice, judgment of 13 December 2012, case C-379/11, *Caves Krier*, par. 52.

[12] In relation to long-term residents who are third-country nationals: CJEU, judgment of 22 April 2012, case C-571/10, *Kamberaj*, par. 90-92.

[13] CJEU, judgment of 11 July 2002, case C-224/98, *D'Hoop*, par. 39; judgment of 21 July 2011, case C-503/09, *Stewart*, par. 95; judgment of 18 July 2013, joined cases C-523/11 and C-585/11, *Prinz*, par. 37.

[14] CJEU, judgment of 18 November 2008, case C-158/07, *Förster*.

[15] CJEU, judgment of 22 September 1988, case 236/87, *Bergmann*, par. 20-22; Court of Justice, *Stewart*, par. 100.

[16] CJEU, judgment of 19 December 2013, case C-138/02, *Collins*, par. 69-70.

[17] CJEU, judgment of 17 January 2013, case C-367/11, *Prete*, par. 50-51.

[18] *D'Hoop*, par. 39.

From this point of view, a clear division of competences between the Court of Justice and national judges can be identified in light of the specific features of the preliminary reference procedure under Art. 267 TFEU. The former follows a principled way of reasoning: it is entitled to state whether a given criterion provided by national law adequately reflects the citizen's degree of integration and is appropriate and proportionate to the objective pursued. It is instead up to the national court to establish whether a real link with the host society actually exists[19], in view of the specific circumstances of each case and of the Luxembourg Court's interpretative trajectories.

The complementarity of the Court of Justice's interpretative guidance and of the material application of EU law by national judges is of major importance, due to recent developments in the case law of the Court of Justice on economically inactive individuals, job seekers, EU citizenship rights and the principle of non-discrimination.

### *2.2. From the genuine link to the residence test: An additional substantive condition for granting welfare benefits*

After a couple of decades of "vast jurisprudential endeavour"[20] aimed at strengthening this "fundamental status of nationals of the Member States"[21], European citizenship is now facing a reverse "reactionary phase" (Spaventa 2016; Belavusau and Kochenov 2016). The Court of Justice is being roundly and harshly criticized for having taken a restrictive stance (Giubboni 2015), sacrificing "the last vestiges of EU citizenship to the altar of [...] nativist tendencies" (O'Brien 2017).

Building on its case law on residence conditions as a means to identify potential recipients of welfare benefits, in *Brey* the Court confirmed that the granting of financial aid could be legitimately subjected to the fulfilment of the requirements for obtaining a right to residence[22]. In that context, the scope of the right-to-reside test was limited to economically inactive citizens claiming social assistance. Its precise purpose was then to avoid excessive burdens on the social assistance system of the host State[23]. However, more recently, in *Commission v. United Kingdom*[24], the Luxembourg Court broadened the scope of this test and accepted its extension to any social security advantage. Moreover, it described this check as a "substantive condition which economically inactive citizens must meet in order to be eligible" for social benefits[25].

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[19] CJEU, judgment of 4 June 2009, joined cases C-22/08 and C-23/08, *Vatsouras and Koupatantze*, par. 41, in relation to the link with the national market; *Prete*, par. 42, with regard to personal connections in the absence of economic links.

[20] Opinion of Advocate General Szpunar of 4 February 2016, case C-165/14, *Rendón Marin*, par. 110.

[21] *Grczelczyk*, par. 31.

[22] CJEU, judgment of 19 September 2013, case C-140/12, *Brey*, par. 44.

[23] *Brey*, par. 30.

[24] CJEU, judgment of 14 June 2016, case C-308/14, *Commission v. United Kingdom*.

[25] *Commission v. United Kingdom*, par. 72.

This means that the right-to-reside test amounts to automatically excluding anyone who fails to fulfil it from social advantages in the host State. The Court disposes of any assessment of the other elements demonstrating the degree of personal and social integration. Irrespective of any consideration of proportionality, the presumption of a sufficient and genuine link in the event of lawful residence is replaced by a blanket rule of exclusion negatively affecting economically inactive citizens[26].

The Court has invoked the same arguments in relation to other specific cases of economically inactive citizens. In *Dano*[27], it deemed an individualized assessment of proportionality unnecessary in the case of claimants exercising their freedom of movement solely to obtain social benefits (Thym 2015). In *Alimanovic* and *Garcia Nieto*[28], concerning the job seekers' regime, the Court of Justice stated that the provisions of Directive 2004/38/EC on the retention of the status of worker provide a sufficiently gradual system capable of taking into account individual circumstances. Job seekers "know, without ambiguity, what their rights and duties are", so that an adequate level of legal certainty and transparency on the award of social assistance is guaranteed[29]. Therefore, no individual assessment is needed, since a normative exclusionary precondition is not fulfilled.

This approach raises at least two major concerns. Firstly, in substance, it applies uniformly to a "patchwork" of individual statuses that do not share the same specific features (O'Brien 2013). What is more, it inflates rigidity in a complex system where flexible job markets, non-standard forms of employment and undeclared illegal work often lead to a misalignment between the EU notion of worker and the national attitude towards the label of inactive citizen (O'Brien, Spaventa and De Conink 2015). The lack of a case-by-case proportionality assessment could likewise be detrimental to people with reduced work capacity due to duty of care, disability, language or cultural barriers.

Secondly, the right-to-reside test "occurs a stage before" that of the principle of non-discrimination on grounds of nationality[30]. In *Commission v. United Kingdom*, the Advocate General submitted that a certain degree of discrimination is an inherent and almost inevitable feature of the freedom of movement[31]. Nonetheless, the exclusionary effects of the right-to-reside test neutralize any considerations on the actual degree of integration of the person concerned. European citizenship no longer triggers the principle of equality with a few proportionality-based exceptions. Instead, citizenship rights - and access to welfare benefits in particular - are restricted by a *de facto* automatic mechanism, to the exclusion of all other elements representing one's degree of integration.

[26] The Court did not answer to the Commission's complaint concerning the disproportionate nature of the residence test provided by the national legislation.
[27] CJEU, judgment of 11 November 2014, case C-333/13, *Dano*.
[28] CJEU, judgment of 15 September 2015, case C-67/14, *Alimanovic*; judgment of 26 February 2016, case C-299/14, *Garcia Nieto*.
[29] *Alimanovic*, par. 60.
[30] Opinion of Advocate General Cruz Villalón of 6 October 2015, case C-308/14, *Commission v. United Kingdom*, par. 77.
[31] Opinion of Advocate General Cruz Villalón in *Commission v. United Kingdom*, par. 75-76.

This increasingly substantial body of case law deconstructs some of the key advances of the integrative implications stemming from EU citizenship. Beyond legal arguments, some authors note the Court's attempt to be a political actor facing the turbulence of the economic crisis (Kochenov 2013 and O'Brien 2017). The permissive effects of the genuine link and the even stricter exclusionary implications of the right-to-reside test are powerful tools in the hands of the EU judiciary and the national authorities to accommodate Member States and their interests (Palladino 2016).

It is therefore worth considering whether, under the pressure of budgetary constraints and public narratives, this jurisprudential tendency is liable to affect economically active EU citizens as well. In this regard, the category of frontier worker appears to be on the front line, due to the aforementioned twofold link with the State of employment and the State of residence. On the one hand, these workers have an economic link with the State where they work and contribute to its welfare system accordingly. On the other, integration requirements do not fit their situation at all: they pay residence-related taxes in the State of origin, where they also often preserve their core interests and personal connections (Falcone 2009).

## 3. The genuine link test, frontier workers and their family members

Regardless of their specific situation, frontier workers have traditionally shared the same status as "ordinary" migrant workers under EU law. As long as they pursue a genuine and real activity for remuneration under the direction of another person, they fall under the broad notion of worker under Art. 45 TFEU, as interpreted by the Court of Justice[32]. Settled case law consistently remarks that EU citizens who, regardless of their place of residence and their nationality, are employed in another Member State fall within the scope of the Treaty provisions on the free movement of workers[33].

Therefore, cross-border commuters are entitled to demand non-discrimination on grounds of nationality and the other prerogatives accorded pursuant to primary law to workers who exercise or have exercised the freedom of movement[34]. Likewise, they are covered by equal treatment provisions enshrined

[32] *Inter alia*, CJEU, judgment of 19 March 1964, case 75/63, *Unger*; judgment of 3 July 1986, case 66/85, *Lawrie-Blum*, par. 16 and 17. It should be remarked that "there is no single definition of worker in [EU] law: it varies according to the area in which the definition is to be applied". CJEU, judgment of 12 May 1998, case C-86/96, *Martinez Sala*, par. 31. However, the various implications of this notion do not affect the definition of frontier workers for the purposes of the present analysis.

[33] CJEU, judgment of 12 December 2002, case C-385/00, *de Groot*, par. 76; judgment of 21 February 2006, case C-152/03, *Ritter-Coulais*, par. 31.

[34] All Treaty provisions relating to free movement of persons are intended to facilitate the pursuit by EU nationals of occupational activities of all kinds throughout the Union. They preclude measures that might place EU citizens at a disadvantage when they wish to pursue an economic activity in the territory of another State. CJEU, judgment of 7 July 1992, case 370/90, *Singh*, par. 16; judgment of 4 March 2004, case C-290/01, *Schilling and Fleck-Schilling*, par. 23.

in the relevant secondary legislation, such as Regulation (EU) 492/2011 and Directive 2014/54/EU on the freedom of movement of workers and Regulation (EC) 883/2004 on the coordination of national social security systems[35].

In line with this approach, while barring discrimination from the national work force, Regulation 492/2011 makes no distinction between migrant and cross-border worker. In fact, recital 5 thereof clarifies that freedom of movement must be enjoyed "without discrimination by permanent, seasonal and frontier workers". Moreover, Art. 7 of the Regulation codifies the principle of equal treatment of any worker, in respect of any conditions of employment and work, including vocational training and social and tax advantages. From this point of view, it is deemed a specific expression, in the field of the granting of such advantages, of Art. 45, par. 2, TFEU[36]. Art. 7 replaces and reiterates without amendments the wording of Regulation (EEC) 1612/68, which was considered to benefit equally the different categories of individuals at issue[37].

Initially, mindful of this provision, the CJEU consistently held that economically active EU citizens exercising their freedom of movement should be automatically accorded access to welfare benefits in the host State[38]. Therefore, the recipients of a benefit should not be required to reside within the territory of the State of employment[39]. The Court also prevented the States from making the payment of a social advantage contingent upon "the completion of a given period of occupational activity"[40].

This stance marked a clear dividing line between economically active and inactive citizens, since the genuine link test applied only to the latter. The direct implication of the requirement of integration was a differentiated attitude towards non-discrimination on grounds of nationality. On the one hand, workers benefited from full equality of treatment with nationals in the Member State of employment. On the other, inactive citizens faced "a more nuanced approach to equality" (O'Brien 2008), subjected to a qualitative assessment of their personal situation, for instance in terms of length of stay, previous working experiences and personal links in the host State. Consequently, Member States could more easily justify indirectly discriminatory measures affecting inactive EU citizens aimed at pursuing legitimate objectives in the public interest.

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[35] Regulation (EU) 492/2011 of the European Parliament and the Council of 5 April 2011 on the free movement for workers within the European Union; Directive 2014/54/EU of the European Parliament and the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of the freedom of movement for workers.

[36] CJEU, judgment of 11 September 2007, case C-287/05, *Hendrix*, par. 53; judgment of 20 January 2013, case C-20/12, *Giersch*, par. 35.

[37] Court of Justice, judgment of 18 July 2007, case C-212/05, *Hartmann*, par. 24; *Geven*, par. 15.

[38] The concept of social advantage covers all advantages that, whether or not linked to a contract of employment, are generally granted to national workers "primarily because of their objective status as workers or by virtue of the mere fact of their ordinary residence on the national territory, and the extension of which to migrant workers therefore seems likely to facilitate their mobility within the Community". *Martinez Sala*, par. 25.

[39] CJEU, judgment of 27 November 1997, case C-57/96, *Meints*, par. 51; judgment of 8 June 1999, case C-337/97, *Meeusen*, par. 21.

[40] CJEU, judgment of 9 July 1987, case 256/86, *Frascogna*, par. 25; judgment of 21 June 1998, case 39/86, *Lair*, par. 42.

However, in *Hartmann* and in *Geven*, the Court of Justice upheld a major reversal of its case law and extended the genuine link criterion to frontier workers (O'Leary 2008). According to the Court, the specific situation of cross-border commuters allows the Member State of employment to verify whether an adequately close attachment to its territory exists. The lack of a "sufficiently substantial occupation" in the State of employment amounts to justifying a refusal to grant a social advantage[41]. Therefore, the Court accepted that indirectly discriminatory legislation restricting the scope of Art. 7 of the Regulation in relation to frontier workers could be objectively justified and proportionate to a legitimate objective pursued by a State[42].

The *revirement de jurisprudence* was later confirmed in *Commission v. Netherlands*[43], where the Court underlined that economically active citizens' access to social advantages can be conditioned on the demonstration of a genuine link with the State concerned. Nonetheless, it tried to scale down its impact by urging a restrictive interpretation of the integration test.

According to the Court, residence requirements are in principle inappropriate to demonstrate the (frontier) worker's sufficient degree of integration. Participation in the employment market *per se* establishes close connections to the State of employment. What is more, as further underlined in subsequent case law[44], through the taxes the (cross-border) worker pays by virtue of his economic activity, he contributes to the State of employment's social policies and general welfare. Therefore, the Court envisaged a strong presumption of integration centred on a change of paradigm from mobility within the internal market to the economic effects of stability after the exercise of the freedom of movement (O'Leary 2014; Barbou des Places 2016). Like any departure from a general principle of EU law, this presumption should be rebutted only in exceptional circumstances, in light of the specific features of each case[45].

However, the case law on the subject is far from settled and the Court recently watered down its own statements. In *Giersch*, where access to a study grant for a frontier worker's daughter was at stake, the Court rejected the presumption of equivalent integration of migrant workers and cross-border commuters. In particular, it contended that access to financial aid could be subjected to the condition of a minimum period of five years of work in Luxembourg, the State of employment[46]. This threshold was considered an appropriate demonstration of the frontier worker's actual attachment to the labour market of that State and to its society as a whole. *A contrario*, a shorter period would not have fulfilled the integration requirement imposed by national legislation.

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[41] *Hartmann*, par. 36; *Geven*, par. 26.
[42] *Hendrix*, par. 54 and 55, with regard to a residence condition.
[43] CJEU, judgment of 14 June 2012, case C-542/09, *Commission v. Netherlands*.
[44] *Commission v. Netherlands*, par. 66. In *Caves Krier*, at par. 53, the Court underlined that the worker's contribution to the social policies of the State of employment is essential to demonstrate his sufficient degree of integration, regardless of his personal situation.
[45] The Court has confirmed this approach with regard to job seekers: *Caves Krier*, par. 55.
[46] *Giersch*, par. 78-80.

The reversed presumption modelled by the Court represented a clear departure from a fully-fledged application of the principle of non-discrimination on grounds of nationality to frontier workers and their family members. Admittedly, it was (also) meant to address the risk - whether real or perceived - of study grant forum shopping referred to by the State concerned and by several other Member States submitting written observations[47]. Indeed, the Luxembourg government took advantage of the condition of a significant period of occupation suggested by the Court to amend its relevant national law accordingly, thereby restricting access to study grants.

Recently, the revised legislation has been fundamentally endorsed by the Court of Justice in *Bragança Linares Verruga*[48], confirming the possibility to make receipt of financial aid for study purposes conditional on a parent having worked for at least five years in the State where the benefit is claimed. However, it clarified that this period must not necessarily be continuous, "inasmuch as short breaks are not liable to sever the connection" between the recipient and the Member State concerned[49]. Proportionality comes in the back door and, at least, prevents the blind application of the chronological integration requirement.

At the present stage, in conclusion, the economic connection to the State of employment no longer automatically allows a frontier worker to receive support from that State. National authorities are entitled to make a case-by-case assessment in order to verify the fulfilment of the genuine link requirement. To perform this task, the national court needs to scrutinize the degree of economic integration in light of elements such as the features of the activity pursued, the duration and continuity of the occupational period, and the worker's actual contribution to the financing of the State of employment.

Hence, the genuine link test applied to frontier workers plays a permissive function in favour of the interests of the Member States (Neframi 2014). It endows the national authorities with a significant margin of discretionary choice as to the openness of their social policies and the selectivity of their welfare systems. The current trend confirms a less ambitious reading of the principle of non-discrimination. As such, it shapes the frontier worker regime after the economically inactive citizen paradigm, under which the achievement of a high degree of integration is a well-established condition to be granted social advantages.

## 4. Concluding remarks: Towards a watered down approach to the principle of non-discrimination?

[47] *Giersch*, par. 80, where the Court acknowledges the need to avoid tourism of social benefits.
[48] CJEU, judgment of 14 December 2016, case C-238/15, *Bragança Linares Verruga*.
[49] *Bragança Linares Verruga*, par. 69. A student's parents had been working in Luxembourg for eight years separated by a few short breaks to seek new employment opportunities. In such situations, national legislation must be flexible enough to allow the national authority to consider the applicant's overall personal condition.

The evolution of the case law of the Court of Justice concerning the frontier worker regime is at odds with the traditional approach to migrant workers, and marks a restrictive view of the principle of non-discrimination on grounds of nationality. The strict stance taken by the Court in relation to EU citizens' rights *de facto* ultimately impacts the weaker categories of migrant workers, namely job seekers - even in case of former employment periods - and cross-border commuters.

Of course, frontier workers cannot be expected to fulfil a residence requirement. However, the rationale underpinning this criterion strikes back via the assessment of the duration and continuity of the employment period and of the nature of the economic activity pursued. Therefore, economically inactive citizens and frontier workers share a revived quantitative approach to the assessment of their personal situation. Quantity can imply the quality of one's degree of integration, though this is not an automatic equation. Moreover, the Court seems tempted to abandon the dynamic, extensive and all-encompassing reading of the freedom of movement of workers. The notion of worker for the purposes of Regulation 492/2011 is uniform and all migrant workers formally share the same regime. However, different degrees of exercise of the freedom of movement accordingly trigger a variety of interpretative solutions.

To uphold this variable geometry of social benefits, it has been pointed out that employment-related benefits do not exclude residence-based benefits as a legitimate expression of territorially organised solidarity, acknowledged by Article 7 of Regulation (EU) 492/2011. In addition to having social and employment ties, residents are taxable in the concerned State and therefore contribute fully to financial welfare.

At first glance, this argument was at the basis of the Court's ruling in *Geven*, were access to the child allowance in Germany was limited to residents, to the detriment of frontier workers. However, in practice, the Court acknowledged that German authorities usually took into consideration additional factors and that the ultimate purpose of the national law was to grant the benefit to persons with a sufficient relationship with the host State, regardless of residence. A closer look at the Court's recent judgments reveals that the social advantages that frontier workers and their family members were seeking were not *per se* related to a stable residence connection. Instead, the justifications raised by national governments and the way that they have been addressed by the Court lead one to consider that the drivers of the restrictive trend under consideration are based mainly on national budgetary concerns.

When a Member State derogates from freedom of movement, it bears the burden of proof as to the legitimate objective it pursues in the public interest and the appropriateness, proportionality and necessity of the measures taken. Two elements consistently arise in Luxembourg case law. From a substantive point of view, departures from general principles of EU legal order cannot be justified solely on grounds of alleged budgetary concerns[50] or vague and undefined social

[50] CJEU, judgment of 20 March 2003, case C-187/00, *Kutz-Bauer*, par. 59; judgment of 10 March 2005, case C-196/02, *Nikoloudi*, par. 53. In any event, the Court has always stated that budgetary

policy goals[51]. From a procedural perspective, the analysis of appropriateness and proportionality should be accompanied by "specific evidence substantiating [the State's] arguments"[52]. The Court also added that "such an objective, detailed analysis, supported by figures, must be capable of demonstrating, with solid and consistent data, that there are genuine risks" to the interest invoked[53].

Therefore, the burden of proof by which the national authorities are bound is particularly stringent. Some scholars have pointed out that such a standard of evidence might even undermine Member States' reliance on public interest justifications (Nic Shuibhne and Maci 2013). In any event, what matters is that, in principle, generalizations do not justify an indirectlydiscriminatory national measure.

Nonetheless, recent case law on frontier workers' access to social benefits widens the mesh of the net of judicial scrutiny of national governments' justifications. For instance, in *Giersch* and *Linares Verruga,* the Court accepts that a study grant should be reserved to frontier workers' children who will likely return to the Member State having financed their studies. According to the Court, the closer the link with such a State, the higher the probability that the student will contribute to that State's development, thus repaying the financial aid received. The standard of proof is significantly undemanding. The Court is satisfied with general assumptions on the national educational policy. The Luxembourg government aims at increasing the proportion of residents with a higher education degree, while avoiding excessive financial burdens deriving from the high rate of frontier workers employed in Luxembourg[54].

Although the evolution of the case law on the subject is still magmatic, this is another critical feature of the shaping of the cross-border workers' regime. It marks another departure from the traditional rationale of free movement of workers that should be considered in view of the development of the internal market as a whole, rather than from the attainment of national economic goals. The Court itself had clarified elsewhere that the acquisition of a qualification or a period of employment does not "assign [a person] to a particular geographical market"[55].

The (at least) less ambitious narrative of the principle of non-discrimination developed through the extension of the genuine link test and a more generous attitude towards Member States' objective justifications place frontier workers on

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considerations may underlie more demanding national policy choices, in terms of healthcare service organization, social policy and environmental policy.

[51] CJEU, judgment of 13 June 1989, case C-171/88, *Rinner-Kühn*, par. 14.

[52] CJEU, judgment of 18 March 2004, case C-8/02, *Leichtle*, par.45; *Commission v. Netherlands*, par. 82.

[53] CJEU, judgment of 13 April 2010, case C-73/08, *Bressol*, par. 71, where the French government intended to preserve public health.

[54] Luxembourg has the largest proportion of frontier workers in the EU. They have been continuously increasing since the 1970s, and were more than 170 000 in 2015, representing about 45% of the work force:
http://www.statistiques.public.lu/stat/TableViewer/tableView.aspx?ReportId=12928&IF_Language=eng&MainTheme=2&FldrName=3&RFPath=92.

[55] *Prete*, par. 45.

the front lines with respect to the practical and legal challenges implied by the free movement of workers. This is further exacerbated by the lack of coherence between the different legal systems of Member States and within the EU legal order itself. Regulation (EC) 883/2004 on the coordination of social security systems assigns exclusive applicable legislation in the event of overlapping benefits or advantages. As such, it pre-determines the division of competences between the State of residence and the State of employment, depending on the nature of the grant at stake and the criteria identified by the European legislator[56]. On the contrary, Regulation (EU) 492/2011 does not prescribe similar rules of coordination. It follows that no protection is afforded to frontier workers who are not eligible for certain benefits in both Member States. Therefore, a restrictive approach to eligibility for social benefits within the Member State of employment can be *a fortiori* detrimental to frontier workers and their family members.


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[56] See for instance CJEU, judgment of 11 April 2013, case C-443/11, *Jeltes*, par. 31: "The provision lays down that a wholly unemployed frontier worker must make himself available to the employment services of his State of residence. That is an obligation, not a right".

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